

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER WAYNE RATHJEN,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 270747

Grand Traverse Circuit Court

LC No. 06-009976-FH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of interfering with the use of a telephone, MCL 750.540, domestic assault, MCL 750.81(3) (second offense), and witness intimidation or bribery, MCL 750.122(7)(a). Defendant was found not guilty of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion), or in the alternative assault with intent to commit sexual penetration, MCL 750.520g(1). We affirm. This case is being decided without oral argument under MCR 7.214(E).

On appeal defendant challenges the introduction of evidence suggesting that while the complainant was out on the evening in question, he used a hammer to damage her refrigerator. Defendant argues that this was impermissible other acts evidence offered in violation of MRE 404(b). Defense counsel failed to object to the mentioning of the damage during opening argument or when testimony was provided about the damage. Although defense counsel objected to the admission of a photograph of the refrigerator, defendant did not argue that the evidence should not be permitted because it constitutes impermissible evidence of other acts, which is the argument he makes on appeal. “Objections based on one ground below are insufficient to preserve an appellate attack based on different grounds.” *Williams v Coleman*, 194 Mich App 606, 620; 488 NW2d 464 (1992). Accordingly, we review defendant’s assertion of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Reversal is only warranted under this standard if a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

MRE 404(b) excludes the admission of evidence of other acts to prove character and show action in conformity therewith. To be admissible under MRE 404(b), evidence of other acts must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). MRE 404(b)(2) requires that the prosecution provide notice in advance of trial “of the general nature of any such evidence it intends to introduce” unless good cause is shown for the failure to provide notice. *People v Hawkins*, 245 Mich App 439, 453-455; 628 NW2d 105 (2001).

However, not all evidence of other acts is subject to MRE 404(b) analysis. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). Evidence of other acts may instead be admissible under MRE 401 as substantive evidence without regard to MRE 404 if it does not operate through an intermediate inference of character. *Id.* Notably, evidence of other acts is admissible if it constitutes part of the *res gestae* of the charged crime. *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). “It is elementary that the acts, conduct and demeanor of a person charged with a crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the *res gestae*. Proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime.” *People v Smith*, 119 Mich App 431, 436; 326 NW2d 533 (1982), quoting *People v Scott*, 61 Mich App 91, 95; 232 NW2d 315 (1975), quoting *People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923). Put differently, evidence of other acts is admissible “when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.” *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P 2d 245 (1964).

In this case, plaintiff suggests that the evidence of other acts is part of the *res gestae* of this case because the inference of defendant’s simmering anger that arises from the damage done to the refrigerator explains the circumstances of the crime. After reviewing the record, we conclude that defendant has failed to establish that the admission of the challenged evidence was plain error affecting substantial rights. In the context of the other evidence presented, the evidence of the damage done to the refrigerator gives rise to the reasonable inference that defendant damaged the refrigerator while the complainant was out because he was angry with her. This conduct and its reflection on defendant’s demeanor at the time of the crime do not involve an improper inference based on character. Rather, it is direct evidence of defendant’s disposition just before the charged crimes occurred, which supports the complainant’s assertion that she was attacked by defendant as she slept. Because the evidence helps to explain the

circumstances of the crime, it was not plain error to admit it. *Sholl, supra* at 742; *Smith, supra* at 436.¹

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto

¹ Further, the evidence concerning the refrigerator was not a major focus of the trial. Rather, the prosecution's primary focus was on the complainant's testimony concerning what happened after she arrived home, evidence that corroborated that testimony (including evidence that she was bruised after the incident), and evidence about defendant's contact with the complainant after his arrest. Accordingly, even if the admission of the evidence was improper, defendant has not shown that it resulted in his conviction despite his actual innocence, or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. Accordingly, reversal is not required. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).